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No. 97-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NAOMI MARQUEZ,
Petitioner,
v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

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RESPONDENT'S REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

This brief for Respondent Screen Actors Guild is filed in reply to Petitioner Naomi Marquez's Supplemental Brief (Supp. Br.) addressed to the recent decision in *Bloom v. NLRB*, No. 97-1582 (8th Cir. Aug. 7, 1998) (Supp. App.).

ARGUMENT

1. We agree with Ms. Marquez that the "opinion of the Eighth Circuit in *Bloom II* provides a powerful argument" as to what the first proviso to § 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3), means and how that provision should be implemented. Supp. Br. at 5. But, that "powerful argument" is *against* Ms. Marquez's appeal for a deep and standardless judicial incursion into the free collective bargaining process. And that argument is *for* the Ninth Circuit's eminently sound approach in this case of taking plain statutory language for what it says:

> [N]othing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . [29 U.S.C. § 158(a)(3).]

The *Bloom* litigation as a whole—and the Eighth Circuit's latest decision in particular—confirms Justice Stewart's observation that "[i]t does not behoove a court to second-guess either th[e collective bargaining] process or its products," *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980), and Congress' decision to draft NLRA § 8(a)(3) and its provisos so as to preclude such second-guessing.

2. As we developed in our main brief (at pp. 17-23), after "devot[ing] the most mature deliberation . . . [to] the problem posed by compulsory union membership," the 1947 Congress chose to continue the statutory permission for employers and unions to "enter into agreements requiring all the employees in a given bargaining unit to be-

come members." S. Rep. No. 105, 80th Cong., 1st Sess. 7 & 5 (1947), reprinted in 1 NLRB, *Legislative History of the Labor Management Reporting Act of 1947* 411 & 413 (1948) ("LMRA Leg. Hist."). Congress' reason for so doing was that "the union shop has been in force in many industries for many years, and to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure." 2 LMRA Leg. Hist. at 1010 (Sen. Taft). Thus, in drafting § 8(a)(3) and its provisos, the Taft-Hartley Congress made a considered decision to *refrain* from "abolishing the possibility of a union-shop contract" and to instead permit union security agreements in the form that "in many trades . . . was entirely customary and had worked satisfactorily." 2 LMRA Leg. Hist. at 1420 (Sen. Taft). Conveying this Congressional decision, "the [first] proviso to § 8(a)(3) . . . expressly permit[s] agreements conditioning employment upon membership in a labor union." *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 751 (1963).

Congress stated its intent on the legality of customary union security agreements with clarity. And that being so, for a half-century after the enactment of the 1947 Taft-Hartley amendments, this Court and the NLRB have recognized the validity of union security agreements expressed in one or another of the standard formulations tracking the provisos to NLRA § 8(a)(3), *viz.*, the "union shop" clause which "require[s] as a condition of employment membership [in the union]," or the "agency shop" clause which requires employees to "tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." *See NLRB v. General Motors Corp.*, 373 U.S. 734, 741-742 (1962) (defining the "union shop" and the "agency shop" and confirming the legality of both).

The Eighth Circuit's decision does not take issue with any of the foregoing, but rather ignores the statutory language and its legislative history, and distorts the decisional law on the validity of standard-form union security agreements.

3. The set of Eighth and Sixth Circuit decisions culminating in the latest *Bloom* decision—and the NLRB decisions those court decisions have generated—demonstrates the deleterious consequences of standardless judicial intervention into the collective bargaining process.

The Eighth Circuit decision in *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), began this process. *Bloom* came before the Eighth Circuit on a petition to review an NLRB decision approving the settlement of a unfair labor practice complaint alleging that a collective bargaining agreement contained an "overly broad union security clause" that had been "unlawfully interpreted and applied." *Id.* at 1005.[1] Given these allegations, the Eighth Circuit held that "an adequate remedy *in this case* requires expunction of *the offending clause*." *Id.* (emphasis added). And, because the settlement had not provided for the expunction of the offending clause, the Eighth Circuit reversed the Board's approval of the settlement and remanded for further proceedings.[2]

On remand from the first *Bloom* decision, the NLRB approved a second settlement that, in the Board's view, met "the concerns about the original settlements expressed

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[1] The union respondent in that case was alleged to have "advised Bloom that the collective bargaining agreement required that he be a member of the union and that if he did not *complete the membership* application and the dues checkoff card, Local 12 would request that Group Health terminate him." 30 F.3d at 1002 (emphasis added). Thus, the union was charged with having made "a literal application of the 'member in good standing' language" contained in the collective bargaining agreement. *Id.* at 1005.

[2] After *Bloom* the D.C. Circuit upheld the validity of standard "union shop" clauses in *I.U.E. v. NLRB*, 41 F.3d 1533, 1539 (D.C. Cir. 1994), and the D.C. and Seventh Circuits upheld the validity of standard "agency shop" clauses in *Abrams v. Communications Workers*, 59 F.3d 1375, 1378-79 (D.C. Cir. 1995), and *Nielsen v. Machinists*, 94 F.3d 1107, 1113-14 (7th Cir. 1996). The Seventh Circuit treated *Bloom* as limited to the question of whether "the settlement agreement should have required the expunction of the union security clause in the[] circumstances, because it had been 'unlawfully interpreted and applied.'" 94 F.3d at 1114, quoting 30 F.3d at 1005.

by the Eighth Circuit" in that "the language objected to by the court has been deleted and different language substituted." *Group Health, Inc.*, 323 NLRB No. 31 (1997), slip op. 3.[3] But, the charging party once again petitioned for review in the Eighth Circuit.

The Sixth Circuit then took matters a step further in *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945. While recognizing that "the Act explicitly permits an employer to enter into a CBA that contains a union-security clause requiring employees to acquire and retain 'membership' in a union as a condition of employment," *id.* at 790, the Sixth Circuit held that "a union-security clause requiring employees to become and remain 'members of the Union *in good standing*' as a condition of continued employment, *without concurrent definition in the collective bargaining agreement*," *id.* at 788 (emphasis added), is not lawful. At the same time, the Sixth Circuit emphasized that "union security clauses are valid in general." *Id.* at 791.

In reaction to *Buzenius*, the NLRB asked the Eighth Circuit to remand the *Bloom* case, so that the Board could reconsider its approval of the settlement in light of the Sixth Circuit's decision. When the Eighth Circuit granted the NLRB's request, the parties, in an effort to avoid another round of litigation, once again revised their settlement agreement, this time to meet the concerns expressed in the Sixth Circuit's decision. The new Group Health clause was phrased in terms of " 'membership' as a condition of employment," which the Sixth Circuit had repeatedly said was allowed by the statute. *Buzenius*, 124 F.3d at 790, 791 & 793. In addition, the clause contained a "concurrent definition of that term." *Id.* at 791. *See also id.* at 788, 792 & 793.

The new Group Health clause provided its "concurrent definition" of "membership" in two steps. First, the clause specified that it was a "condition of employment" that

[3] Before the NLRB, the case known as *"Bloom"* in the Eighth Circuit was known as *"Group Health."*

employees "become members of the Union . . . *within the requirements of the National Labor Relations Act.*" *Group Health, Inc.*, 325 NLRB No. 49 (1998), slip op. 1-2 (emphasis added). Second, the clause contained the following brief description of what membership "within the requirements of the National Labor Relations Act" entails:

> Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payor shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities. [*Id.* at 2.]

By any standard, this new Group Health clause met the *Buzenius* "concurrent definition" requirement. Not surprisingly, then, the NLRB approved the new Group Health clause as meeting the concerns of the Eighth Circuit in *Bloom* and the Sixth Circuit in *Buzenius*. *Group Health Inc.*, 325 NLRB No. 49 (1998). But the plethora of different views expressed by the various NLRB members in the process only added to the confusion. Two Board members (Members Fox and Liebman) found this Group Health clause to contain an accurate and proper "explanation of the lawful extent of the employees' union obligation." 325 NLRB No. 49, slip op. 3 (quotation marks and brackets omitted). A third member (Member Hurtgen) found that the clause warranted approval as part of settlement agreements, but declined to express any view as to whether "the Board as a matter of policy, should require a different clause or, at least, should have a different clause as a model." *Id.* at 2 n. 10. NLRB Chairman Gould agreed that the Group Health clause warranted approval as part of the settlement agreements, but went on to strongly urge that the Board adopt his own preferred "model union-security clause." *Id.* at 6. And, the fifth Board member (Member Brame) dissented from the approval of the settlement agreements "both because

they fail to remedy defects explicitly identified by the court of appeals, and because they would put the Board in the business of issuing advisory opinions in unfair labor practice proceedings without litigation of the issues." *Id.* at 7.

In reversing the NLRB's third and latest *Group Health* decision, the Eighth Circuit's decision in *Bloom II* adds to the cacophony. The decision in *Bloom II* mandates a union security provision that is nothing like what the Group Health parties negotiated and orders that the court's clause be included in the parties' collective bargaining agreement. Supp. App. 12a-13a. And, contrary to the Sixth Circuit's *Buzenius* decision, which recognized that "union security clauses are valid in general," 124 F.3d at 791, the Eighth Circuit declared that it "will no longer uphold or enforce a union security clause that does not contain this language or reflect its undiluted equivalent," Supp. App. 13a. Thus, the Eighth Circuit ruled in effect that *all* extant union security clauses—included in thousands of collective bargaining agreements within that court's jurisdiction—are legal nullities.

We submit that the Eighth Circuit's approach would be wrong even if that court had proved to be a better draftsperson than the labor and management parties to collective bargaining or the different sets of Board members in *Group Health*. This is so because "the fundamental premise on which the [National Labor Relations] Act is based [is] private bargaining under governmental supervision of the procedure alone, *without any official compulsion over the actual terms of the contract.*" *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)(emphasis added). *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982). But the *Bloom* court did not simply act beyond its authority, that court drafted and mandated a clause that both fails to express the obvious intent of the contracting parties and fails to fulfill the court's stated goal of providing a clear explanation to employees of their statutory rights.

To begin with, the union security clause prescribed in *Bloom II* is nothing like the union security agreement sanctioned by the NLRA § 8(a)(3) first proviso. The type of agreement contemplated by the statute provides that covered employees are "require[d] as a condition of employment" to either become a full union member and remain current in dues payments or in the alternative to "tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3). *See NLRB v. General Motors Corp.*, 373 U.S. at 741. By contrast, the *Bloom II* "union security" clause—appearing in the fourth of the five paragraphs prescribed by the Eighth Circuit—provides:

> Employees who decline to join the union *may be required, at a minimum,* to pay a reduced service fee equivalent to his or her proportionate share of union expenditures that are necessary to support solely representational activities in dealing with the employer on labor-management issues. [Supp. App. 13a (emphasis added).]

This does not create a contractually binding union security agreement in any sense. Nothing in the *Bloom* provision says—or even fairly implies—that any covered employee is *required* to pay any amount to the union acting as her collective bargaining representative, much less that the requirement will be enforced as a condition of employment. And, the *Bloom* clause ignores altogether that the covered employees who do become full union members —as well as employees who do not—are properly subject to union security requirements, as well.

The *Bloom II* clause also fails as a notice of the rights of objecting nonmembers. The clause does not even suggest, much less state, that "dissent is not to be presumed —it must affirmatively be made known to the union by the dissenting employee." *Machinists v. Street*, 367 U.S. 740, 774 (1961). And, the Eighth Circuit's standard for the amount that nonmembers "may be required, at a minimum to pay," i.e., "his or her proportionate share of union expenditures that are *necessary* to support *solely* reresenta-

tional activities in dealing with the employer on labor-management issues," Supp. App. 13a (emphasis added), is far more restrictive than this Court's "germane to collective bargaining" standard for chargeable union expenditures. *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984). As this Court has explained, under that standard:

> [O]bjecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit. [*Id.* at 448.]

Beyond that, the *Bloom II* clause creates contract rights for covered employees to "freely join . . . the union" and to "freely retain . . . membership," Supp. App. 12a, that would appear to override any union rules governing admission to or expulsion from membership. This is contrary to Congress' decision to "not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1). *See also Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 204 (1944) ("the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership").

4. As if the foregoing were not enough to condemn the Eighth Circuit's foray into the drafting of collective bargaining agreements, the *Bloom II* court announced that the Eighth Circuit "will no longer uphold or enforce" *any* union security clause but the one that court has mandated. That is the Eighth Circuit rule no matter how clear it may be that the parties intended to reach a union security agreement within the bounds of the law and no matter how clearly they may have explained that intent and the legal ramifications to the covered employees.

This sweeping invalidation of all extant union security agreements—including the agency shop provision specifically approved by this Court in *NLRB v. General Motors Corp., supra,*—will most certainly "infringe" the union's

right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining," *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), and will thereby, "interfere with the . . . unions' performance of those functions and duties which the [National Labor Relations] Act places upon them to attain its goal of stability," *Machinists v. Street*, 367 U.S. at 771.

The Eighth Circuit blithely invalidates this central provision in thousands of collective bargaining agreements without pausing a moment to consider the practical consequences. Even if the Eighth Circuit had given clear and legally sound guidance on what sort of agreement should be substituted for standard form union security agreements —and it has not done so—that would not serve to amend all of the existing collective bargaining agreements *pro tanto*. Given the bi-lateral system of free collective bargaining, the affected unions would have to convince the employers to come to terms on a union security agreement for a second time and in a new and unfamiliar form. It is far from clear that the employers would be under any duty to bargain over such midterm modifications of their contracts. *See* NLRA § 8(d), 29 U.S.C. § 158(d). It is, moreover, totally unclear whether the unions would be privileged to strike in support of their demand for a new union security clause or what it would mean for the binding effect of the rest of the agreement were the union to go on strike.

It is precisely to avoid this sort of disruption that Congress wrote NLRA § 8(a)(3) and its provisos as it did. As Congress recognized, a contract's function is to establish a legal relationship between the parties. Such legal documents do *not*, as a rule, serve as a compendium of all the legal consequences flowing from the parties' agreement or as some form of notice informing third parties of all of the contract's ramifications and legal consequences. A contract provision stated in terms of art that are well understood by the parties and are capable of lawful enforcement is well suited to playing its role in the contractual regime. That is why such clauses are lawful under the

general law of contracts and have always been regarded as lawful under the NLRA.

The *Bloom II* court points to no language in the NLRA that would justify the punitive and wholly irrational results visited by its decision. Nor is there any policy basis for invalidating the entire universe of union security clauses.

Prior to the Sixth Circuit's decision in *Buzenius* and the Eighth Circuit's *Bloom* decisions, the NLRB placed the obligation to notify employees of their legal rights and obligations under union security clauses squarely on the employees' union representive. *Paperworkers (Weyerhaeuser Paper Co.)*, 320 NLRB 349, 350 (1995), *rev'd on other grounds. Buzenius v. NLRB, supra.*

In other words, the Board placed the obligation to notify employees of the effect of the agreement on the only party to the contract that has a statutory duty to the employees in this regard. If the union fails to take affirmative steps to inform an employee of the legal limits on the enforcement of the union security clause, the NLRB remedies that dereliction by ordering the *union*, to so inform the employees; by allowing the employees to retroactively exercise their rights to refrain from union membership and refrain from paying full dues; and by redressing any harm that was actually caused by the union's failure. *See Rochester Manufacturing Co. (Teamsters Local 614)*, 323 NLRB No. 36, slip op. 4 (March 12, 1997), *pet. for rev. pending sub nom., Cecil v. NLRB*, No. 7-5302 (6th Cir.) (ordering union to notify employees of their rights and to retroactively honor resignations from membership and nonmember objections by reimbursing the nonchargeable portion of the objectors' agency fees).

The NLRB's approach to the problems of informing employees of the nature of their obligations under a union security clause is not only consistent with the language of the NLRA and the intent of Congress, but also with the rights and needs of employees and the realities of the collective bargaining system.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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